Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

DOCKET FILE COPY ORIGINAL

RECEIVED
DEC 12 1997
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:	)	
	)	
Communications Assistance for Law Enforcement Act	)	CC Docket No. 97-213
	)	

GTE's COMMENTS

GTE Service Corporation and its affiliated telecommunications companies

Richard McKenna, HQE03J36
GTE Service Corporation
P.O. Box 152092
Irving, TX 75015-2092
(972) 718-6362

Gail L. Polivy
1850 M Street, N.W.
Suite 1200
Washington, DC 20036
(202) 463-5214

Their Attorneys

December 12, 1997

No. of Copies rec'd 0+6
List ABCDE

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY

Congress in 1994 passed into law the Communications Assistance for Law Enforcement Act ("CALEA"), 47 U.S.C. section 1001-1010; and in 1996 passed into law the Telecommunications Act of 1996 ("the 1996 Act"), which modified and supplemented the Communications Act of 1934, 47 U.S.C. section 151 *et seq.*

GTE suggests that the Commission, informed by the record of this proceeding, should be able to play a key role under CALEA in assuring the three outcomes the NPRM (at paragraph 5) correctly identifies as critical: (1) to preserve a narrowly focused capability for law enforcement agencies to carry out properly authorized intercepts; (2) to protect privacy in the face of increasingly powerful and personally revealing technologies; and (3) to avoid impeding the development of new communications services and technologies.

Now as in the past, the industry acts in harmony with the foregoing principles and all applicable legal requirements. Guided by experience, the Commission can, and should, adopt necessary requirements related to CALEA while avoiding excessive and pointless burdens. Further, GTE believes the Commission can clear away uncertainties associated with CALEA, thus allowing government and industry to cooperate in building on past success in order to meet the challenges of a rapidly evolving future.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
Communications Assistance for Law Enforcement Act	)	CC Docket No. 97-213
	)	

GTE's COMMENTS

GTE Service Corporation and its affiliated telecommunications companies[1] hereby offer their views in response to the FCC's Notice of Proposed Rulemaking, FCC 97-356 (released October 10, 1997) (the "NPRM"), 1997 FCC LEXIS 5984, as follows:

DISCUSSION

I. THE COMMISSION SHOULD RECOGNIZE THAT STATUTORY TERMS IN CALEA AND IN THE COMMUNICATIONS ACT SHOULD BE GIVEN AN INTERPRETATION THAT RELATES TO THE DISTINCT PURPOSES OF THE TWO STATUTES.

A. GTE agrees with the Commission's conclusion that the CALEA definitions of "Telecommunications Carrier" And "Information Services" were not modified by the 1996 Act.

The NPRM (at paragraph 15) tentatively concludes that Section 601(c)(1) of the 1996 Act[2] establishes that CALEA's definition of telecommunications carrier was not

---

[1] GTE Alaska Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, The Micronesian Telecommunications Corporation, GTE Midwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, Contel of Minnesota, Inc., Contel of the South, Inc., and GTE Wireless, Products and Services, Inc., GTE Airfone Incorporated and GTE Railfone Incorporated

modified by the 1996 Act. To the extent that any difference exists between the definitions in the two statutes, that difference must be considered in light of the different legislative purposes of the two acts. It is significant that Congress chose to employ similar terminology, but always there must be considered the different overall purpose that is sought to be implemented.

The Communications Act contains a number of mandates that promote the availability of nationwide telecommunications at reasonable cost. To this end, Congress passed the 1996 Act to foster a new competitive telecommunications environment brought about largely by eliminating unnecessary regulatory burdens. The goal of the 1996 Act and the Communications Act as modified thereby is assuring nationwide quality telecommunications services at reasonable cost.

In contrast, CALEA addresses an entirely different set of issues. There, the underlying problem concerns the risk of criminals doing grave damage to persons or property. The language of CALEA must be read with a scope broad enough to encompass that risk -- a risk that could include organized crime, terrorists, kidnappers, serial killers and the like.

This means Congress passed two entirely different statutes in 1994 and 1996 seeking to accomplish entirely different purposes. This is best illustrated by looking at FCC regulation of resellers. In terms of the risks being dealt with under the Communications Act, resellers represent such a modest level of risk the Commission even before 1996 concluded there was no need for active regulation of resellers. In

---

[2] Section 601(c)(1) says: "This [1996] Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments."

terms of the CALEA risks, however, a reseller may present all the same risks as an underlying carrier. The FCC should interpret CALEA in relation to its congressional purpose and intent without permitting common carrier regulatory issues and concepts -- that are generally irrelevant to the concerns contemplated by CALEA -- to have an undue influence.

It would be neither logical nor practical to presume that Congressional use of traditional common carrier language in the 1996 Act was intended to alter the impact of CALEA. Guarding against dangerous illegal activities is so different at the outset from the thrust and purpose of Title II regulation it warns us against rigidity, and this warning is further strengthened by subsection 601(c)(1), quoted *supra*. It is no part of the CALEA objective to supervise or review the efficiency of any particular carrier or of a type of carrier or of all carriers. The CALEA concern is not efficiency of service or economy of service or the like, while that is precisely the FCC's concern under the Communications Act. Different statutory purposes should lead to a different reading of terminology in order to comport with the overall congressional intent.

B. The Commission correctly provides examples of telecommunications carriers rather than attempting to prepare a definitive list.

The NPRM (at paragraph 16) tentatively concludes that all entities previously identified therein as common carriers for purposes of the Communications Act are telecommunications carriers that are subject to CALEA. As just pointed out, CALEA addresses the opportunity presented by telecommunications networks for criminals to endanger lives and property. Thus, the scope of CALEA should relate to these dangers. As suggested *supra*, it might be entirely appropriate to include firms in

CALEA's carrier definition that would not come within the regulatory intent of active common carrier regulation under the Communications Act. Conversely, the regulatory details of 47 U.S.C. section 201 *et seq.* would seem to have little bearing on the purposes of CALEA.

Because CALEA is designed to protect the American public from criminal activity, GTE supports the Commission's proposal (at paragraph 16) to include within the definition of telecommunications carrier for purposes of CALEA any entity that holds itself out to serve the public indiscriminately in the provision of telecommunications service. While established concepts of common carriage clearly come into play because Congress chose to employ the traditional language, the determination related to the purposes of CALEA and the dangers being guarded against should not automatically follow the same path as Communications Act regulation.

Further, given today's network technology and criminal savvy, the listing of "telecommunications carriers" to come within common carrier regulation meets very different criteria compared to that which will emerge as sophisticated criminality evolves. Government should have the flexibility to move for CALEA purposes promptly and decisively in order to include new participating "telecommunications carriers."

C. Resellers and purchasers of UNEs should be subject to CALEA and responsible for all administrative aspects of CALEA.

The NPRM (at paragraph 17) specifically seeks comment on the extent to which resellers should be included in CALEA's definition of "telecommunications carrier." GTE is satisfied that resellers come within this definition for the reasons indicated *supra* and in addition as a matter of sheer practicality. With the advent of competition across the board, the customers of a reseller do not necessarily have a business relationship

with the underlying carrier. Where there is no relationship, the underlying carrier cannot take responsibility for CALEA matters involving a party not its own customer. Unlike a case where the target of the inquiry is GTE's customer -- when GTE routinely verifies the data for the target (name, phone number) before initiating the intercept -- GTE would be unable to check this basic data for reseller customers that are not also GTE customers. This reinforces the point that responsibility must rest firmly with the reseller. For practical as well as theoretical reasons, resellers must be treated as carriers for CALEA purposes.

As in the case of resellers, discussed *supra*, purchasers of unbundled network elements (UNEs) should also be subject to CALEA requirements. CALEA provides law enforcement with an ability to intercept calls and gather call identification information from calls made by subscribers to telecommunications services provided by telecommunications carriers. For reasons of privacy and first amendment protection, law enforcement agencies generally must obtain permission from the courts to conduct CALEA activities. It must be expected that CALEA-related activity will be directed at users of telecommunications networks, not telecommunications carriers themselves. For this reason, GTE maintains that not only are resellers and purchasers of UNEs subject to CALEA, but they are also responsible for all administrative aspects of CALEA, including coordination with law enforcement and record creation, verification, and retention. Under normal circumstances, it should be understood that the requesting law enforcement agency will deal directly with the provider of the service (*i.e.*, resellers and UNE purchasers) and not the facility provider.

II. THE TELECOMMUNICATIONS INDUSTRY HAS PROVIDED TIMELY AND EFFICIENT SUPPORT TO LAW ENFORCEMENT AGENCIES FOR MANY YEARS; THE BURDENSOME AND EXPENSIVE REPORTING AND RECORDKEEPING MEASURES ADVOCATED IN THIS NPRM ARE UNNECESSARY.

A. The Commission should avoid unnecessary and burdensome reporting of unlawful interceptions to itself or affected law enforcement agencies.

The NPRM (at paragraph 27) requests comment on the extent to which the Section 105 duty extends vicarious criminal and civil liabilities to a carrier if the carrier's employees are convicted of intercepting communications illegally. GTE urges the Commission to reject any such notion. Existing standards governing violation of criminal and civil law should be carefully respected. There has been no showing of any extraordinary requirement here, and stricter enforcement of Section 605 is not the thrust of CALEA. It would be highly inappropriate to turn a proceeding looking toward protecting the ability of law enforcement to operate into a proceeding that would increase penalties, change burdens of proof (if possible), and the like. That would belong, if anywhere, in a very different proceeding looking to more stringent enforcement of 47 U.S.C. section 605, for example. It should not be entertained here.

The NPRM (*id.*) also requests comment on a proposed Commission rule that would require carriers to report all illegal wiretapping and compromises of the confidentiality of the interception either to the Commission and/or the affected law enforcement agency or agencies. GTE urges the Commission not to entertain this proposal. Again, there has been no showing of abuse or exposure to justify such a program.

The telecommunications industry is fervently committed to protecting the privacy of all individuals. Most, if not all, telecommunications carriers have long-established procedures, including periodic reviews of company Codes of Ethics, dealing with security concerns and briefings on the privacy issues associated with telecommunications, including 47 U.S.C. section 605. GTE suggests its own practices along these lines -- as well as general industry practices -- are more than adequate to protect users of telecommunications services from unauthorized interceptions. Thus, the NPRM's proposal to impose a rule requiring all illegal wiretappings and compromises of the confidentiality of the interception to be reported to the Commission and/or the affected law enforcement agency is unnecessary and unduly burdensome.

The NPRM also proposes a rule requiring carriers to state in their internal policies and procedures that carrier personnel must receive a court order or, under certain exigent circumstances, an order from a specially designated investigative or law enforcement officer, before assisting law enforcement officials in implementing electronic surveillance. In addition, the NPRM (at paragraph 29) proposes requiring carriers to incorporate into their policies and procedures the list of the exigent circumstances found at 18 U.S.C. section 2518(7). To the extent that existing procedures do not include specific language directing carrier personnel to ensure receipt of a court order, GTE does not object to the requirement that carriers include such language in documentation used to educate employees. However, carriers should only be required to inform employees that exigent circumstances may occur and how they are to deal with these circumstances. Carriers should not be required to maintain lists of newly identified exigent circumstances. When the law enforcement entity

provides notice, this notice should furnish all that is needed to confirm exigency of circumstances.

B. The Commission should recognize that much of the proposed recordkeeping is being done today and additional rulemaking is not necessary for carriers to administer effectively CALEA requirements.

The NPRM (at paragraph 30) seeks comment on several aspects of internal carrier authority. There is a proposal to designate specific employees, officers, or both to assist law enforcement agencies -- individuals who would be required to create and maintain separate records for the purpose of guaranteeing effective supervision of work done by non-designated employees. Next, all involved employees would be required to sign affidavits signifying an understanding of a whole host of details about the interception. NPRM at paragraph 31.

Carriers today maintain records of the type of information identified by the NPRM at paragraph 31. This information is necessary to manage logistically the actual intercept activity. However, the imposition of an affidavit request does nothing to enhance the capability of the carrier to meet its CALEA obligations. Indeed, it introduces a meaningless exercise which adds additional cost and, more importantly, time to the process when time may be very scarce.

Similarly, the NPRM (at paragraph 32) creates another list of details, some of which is duplicative of the previous list, for purposes of recordkeeping. GTE does not object to maintaining the information identified at paragraph 32. This information is typical of the type of information that is being recorded today. However, GTE reminds the Commission that recordkeeping is expensive and retention beyond reasonable limits should be discouraged.

The NPRM (at paragraph 33) further invites comment on whether its rules should require telecommunications carriers to create and maintain an official list of all personnel designated by the carriers to effectuate lawful interceptions; and whether carriers should be required to designate a senior officer or employee to serve as the point of contact for law enforcement officials. The NPRM (at paragraph 33) also asks for comment on the information that should be included on this list; and, in particular, whether it should contain each designated employee's name, personal identifying information (date and place of birth, social security number), official title, and contact telephone and pager numbers. Law enforcement agencies have a legitimate concern that a single point of contact for every carrier will be easily accessible on very short notice for purposes of initiating CALEA activities.

This is a reasonable expectation. A company's single point of contact for these purposes should be identified by job function, functional address (including a functional e-mail address), and the telephone number that is to be answered by a knowledgeable person. Beyond that, there is no need for law enforcement to have detailed knowledge of each and every individual that might become involved in implementing an intercept. Moreover, lists of personnel will be perennially out of date as employees move to other jobs or leave the company. The unstated and unevaluated benefit to law enforcement of this additional information would not approach the unreasonable burdens for all carriers in the country to maintain such a list.

GTE urges the FCC to put aside notions that would result in nothing more than pointless papershuffling. In compliance with the spirit of the 1996 Act, the FCC has attempted to remove bureaucratic requirements that will surely occupy file drawers with

masses of paper never looked at. This is precisely what would happen if these recordkeeping provisions were adopted. The carriers are placed under certain obligations by CALEA and the FCC's rules, and it is sufficient that they should be held accountable for their compliance therewith.

C. Because CALEA is critical to the protection of all citizens, there should be no distinction for compliance purposes between large and small companies.

The NPRM (at paragraph 35) seeks comment on whether a threshold based on annual revenues permitting smaller companies to minimize the burdens of complying with CALEA is in the public interest; and further proposes to define "small telecommunications carriers" in terms of the indexed revenue threshold provided in 47 C.F.R. section 32.9000. GTE's comments, *supra*, on the difference in thrust and purpose of the two statutes, CALEA and the Communications Act, are especially relevant in this context. It would be a mistake to relate the extent of CALEA-related burdens to company revenue levels, as proposed in the NPRM, because company revenue levels have nothing to do with the risk being guarded against.

This is not common carrier regulation; it is not "level-playing-field" regulation. A small reseller in Los Angeles may present many times the CALEA-related problems compared to a far bigger carrier in Wisconsin. To consider the question of different levels of regulation, one should not jump to the erroneous conclusion that the same logic applies as in typical common carrier matters; rather, the purpose of the statute should be foremost.

The best approach is to impose heavy regulatory burdens on no one. The needs of the government can be met without massive data and filing requirements -- as they

are being met today by most of the industry. A certification requirement as proposed in the NPRM at paragraph 35 should suffice to reflect the carrier's recognition of its obligations, regardless of its size, wealth, or the like.

Each carrier should be responsible for its own customers. A carrier that does not have the internal capability to deal with a reasonable requirement can purchase support from numerous consultants and from other telephone companies. Inasmuch as imposition of a complex and difficult requirement is unnecessary for carriers of any size, there should be no need for a simplified requirement for some carriers; and using the conventional cut-offs based on revenues makes no real sense in the CALEA context.

Regarding Section 403 of the Communications Act and its empowerment of the Commission to require carriers to provide their policies and procedures, and records related to electronic surveillance policies and procedures, (NPRM at 37) GTE urges the Commission to ignore this opportunity to create more useless paperwork for itself as well as the carriers. It must be remembered that nothing in this NPRM breaks new ground in terms of carriers providing timely and effective assistance to law enforcement agencies. To be sure, there are some new and challenging technical issues facing both the industry and law enforcement. However, no matter how those issues are resolved, the administrative steps necessary to ensure successful completion of a CALEA request will not be substantially different than they are today.

III. SO LONG AS THE FBI IS UNABLE TO IDENTIFY IN REALISTIC TERMS WHAT ITS REQUIREMENTS ARE EXPECTED TO BE, THE QUESTION OF REASONABLE ACHIEVABILITY WILL BE INDETERMINATE.

GTE has cooperated, and continues to cooperate, with the FBI in its attempt to address this critically important subject. A grave problem has arisen from the inability

on the part of the FBI in the past to identify its requirements in realistic terms. The only formal statement of requirements the FBI has issued would, for example, assume that the entire monthly wiretap requirement for Los Angeles would fall on a single switch at a single moment in time. No engineer would construct a network to meet such a requirement unless by the nature of the communication there was no tolerance to a shortfall of facilities at any time -- a condition that does not appear to apply here. No state or federal regulatory agency would approve the massive investment that would be required to meet such a requirement since such an investment program would necessarily result in tremendous underuse of facilities. For the same reason, no carrier that hoped to be competitive would construct a network to meet such a requirement. And if notwithstanding these conditions the additional facilities were created, it would be most unlikely the FBI would have enough technicians and agents to make use of such masses of facilities all at the same time.[3]

There is a critical need for the FBI to identify in realistic terms what its requirements are expected to be. This must be an estimation of what is likely; it cannot extend to the entire universe of what would be conceivable. All telecommunications facilities are constructed on the basis of statistical probabilities. Absent realistic identification of FBI wiretapping requirements, it is impossible for carriers to quantify with any confidence the needs they are responsible for meeting under CALEA. The Just Compensation Clause of the Fifth Amendment to the Constitution of the United

---

[3] It has been reported that the FBI will shortly provide a helpful clarification of its requirements. This is encouraging. It would represent a major step forward by identifying the benchmarks for carrier performance.

States says: "[N]or shall private property be taken for public use, without just compensation." This means: At the point when there is an effective mandate requiring a carrier to expend funds on CALEA compliance over and above what the carrier would have spent anyway, a constitutional right to reimbursement is generated.

This right cannot be taken away by CALEA or agency action under CALEA. It is argued by the FBI that such a requirement currently exists notwithstanding the fact that the carriers have never been furnished with a plausible statement of the CALEA-related requirements they would be responsible for meeting. Then it is claimed that CALEA denies recovery for the costs of compliance if incurred subsequent to 1995. The 1995 date has become irrelevant in 1997 since the carriers still do not know what the real requirements of the FBI are likely to be.

In constitutional terms, to the extent carriers are required to expend funds for CALEA purposes they have a right of recovery. Not even Congress has the power to take away that right. It is likely that complex compensation questions will have to be dealt with in court, unless Congress modifies CALEA. The FCC should provide guidance so the FBI will specify in plausible terms the extent of its requirements so that the nation's telecommunications carriers will be able to assure themselves that they are in compliance with CALEA while at the same time identifying the scope and nature of their reimbursement claims. GTE urges the Commission to address these matters in this proceeding by asking the FBI to submit on the public record a reasonable statement of its needs.

In GTE's view, under section 107 of CALEA, the Commission now has ample grounds to proceed toward establishing standards under CALEA. The grounds for this

conclusion are set out in the July 1997 petition filed by the Cellular Telecommunications Industry Association (CTIA) referred to in paragraph 44.[4] The Commission need not reverse its decision (stated in paragraph 44) not to address at this time "technical capability standards issues." A record would have to be created on this question to form the basis for FCC action in a subsequent phase. But the FCC should get started in addressing this question. To have any serious address to the issue, the 1998 deadline would have to be reconsidered. Even from the point when standards are identified it would be many months before there could be full implementation.

Respectfully submitted,

GTE Service Corporation and its affiliated telecommunications companies

Richard McKenna, HQE03J36
GTE Service Corporation
P.O. Box 152092
Irving, TX 75015-2092
(972) 718-6362

By _____
Gail L. Polivy
1850 M Street, N.W.
Suite 1200
Washington, DC 20036
(202) 463-5214

December 12, 1997

Their Attorneys

---

[4] The Telecommunications Industry Association (TIA) Subcommittee TR 45.2 has just recently approved a standard for Lawfully Authorized Electronic Surveillance. The FBI has consistently opposed this industry standard, making it clear that the Commission is justified in exercising its authority to establish standards under CALEA.